United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1654

No. 74-1654

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF JERRY LANGELLA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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Statutes:

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ISSUES PRESENTED

1. Whether a grand jury witness whose telephone conversations have been intercepted pursuant to court orders is entitled to inspect those orders and supporting affidavits in order to litigate their validity in civil contempt proceedings brought after the witness has refused to answer questions based on information acquired from the interceptions.

2. Whether court-ordered immunity was effective to compel the witness' testimony over a claim of Fifth Amendment privilege.

3. Whether an order extending the original term of the special grand jury for a second six-month period was valid.

STATUTE INVOLVED

18 U.S.C. 6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT

1. On April 17, 1974, in the United States District Court for the Eastern District of New York, appellant was found to be in civil contempt, pursuant to 28 U.S.C. 1826(a), for refusing to answer a question before a grand jury. He was committed to custody for the life of the grand jury as it may be extended, or until such earlier time as he purged himself of contempt (App. 47).[1/]

1/ "App." refers to the appendix to the brief for the appellant.

2. On April 17, 1974, appellant was summoned before a special grand jury in the Eastern District of New York empanelled pursuant to 18 U.S.C. 3331(a) to investigate racketeering influence in legitimate business. He asked to be advised whether some of the questions posed would be based upon information gathered through electronic interception of telephone conversations. The government responded in the affirmative (App. 13), stating that the surveillance had been conducted under court order.[2/] Appellant requested the district court to undertake an in-camera inspection of the order (App. 11, 13); the request was denied. When subsequently brought before the grand jury he refused to answer the question, "Do you know Alphonse Persico?" (App. 40-41; 45-46) on Fifth Amendment grounds, whereupon he was shown a court order granting him immunity under 18 U.S.C. 6002, 6003 (App. 22-24, 52), and advised that none of his testimony could be used against him App. 24). Appellant was again brought before the district court and, over objections not raised in this appeal, ordered to answer. He persisted in his refusal (App. 46). Thereupon he was held in civil contempt pursuant to 28 U.S.C. 1826(a) and ordered confined for the life of the grand jury

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2/ In fact there were three court orders, an original authorization and two extensions. They are in the custody of this Court in connection with a related case, In Re Persico, 491 F.2d 1156 (2 Cir., 1974), certiorari denied No. 73-1741, October 21, 1974.

as it may be extended, or until such earlier time as he gave the required testimony (App. 47). He remains in custody.

In the interim, appellant on May 20, 1974, sought direct review in the Supreme Court pursuant to 28 U.S.C. 2101(e), by joining his petition for a writ of certiorari to that sought in In Re Persicc, supra.[3/] Certiorari was denied on October 21, 1974. Meanwhile, on April 22, 1974, appellant filed with this Court a notice of appeal from the contempt judgment (App. 55). Following denial of certiorari, appellant on November 27, 1974, filed his brief on appeal. In addition, appellant filed four motions with the district court, each on different grounds, in which he attacked the judgment and/or sought his release. All were denied. All are presented in this appeal.

First, on June 26, 1974, the district court heard appellant's motion to inspect the court orders authorizing the electronic interception (App. 56-85), and denied it on the authority of Persico, supra (App. 86).

3/ In petitioning for a writ of certiorari and bypassing direct appeal to this Court, appellant contended in his petition (No. 73-1741) that his arguments before this Court were foreclosed by this Court's decision in Persico, supra. In opposing appellant's petition for certiorari, the government argued, inter alia, that appellant's petition was premature and should be denied under Rule 20, Rules of the Supreme Court.

Second, on July 30, 1974, the district court denied a motion submitted upon the foregoing pleadings and proceedings plus counsel's affidavit, seeking to set aside the contempt judgment on the grounds that the court-ordered immunity was defective because it was not sought by the United States Attorney (App. 95-97). The motion was denied, the district court finding that "The application [for immunity] is recited as one made by the United States Attorney and that meets the requirement of Section 6003(b)..." (App. 98).

Third, on October 11, 1974, the district court heard and denied appellant's motion for an order releasing him from custody under 28 U.S.C. 2255 on the joint grounds that his confinement for extensions of the grand jury's life was improper, and that there must be a showing that the grand jury's investigation was continuing (App. 99-125).

Finally, on November 18, 1974, the district court denied a motion to discharge the special grand jury on several grounds previously raised and denied, plus a contention that the extension of the grand jury's life was improper because it was granted without notice to the extending court that appellant remained in custody (App. 139-140).

ARGUMENT

I. THE WITNESS WAS NOT ENTITLED TO INSPECT COURT ORDERS AND SUPPORTING AFFIDAVITS FOR INTERCEPTION OF HIS TELEPHONE CONVERSATIONS

A. A Witness Who Has Been Granted "Derivative Use" Immunity Is Not Entitled To A Hearing To Ascertain Whether Questions Posed Were A Product Of Unlawful Electronic Surveillance Where, As Here, The Surveillance Was Undertaken Pursuant To A Court Order.

In Gelbard v. United States, 408 U.S. 41 (1972), the Supreme Court held that in contempt proceedings instituted under 28 U.S.C. 1826(a) for failure to obey a court order to answer a question before a grand jury, the recalcitrant witness may avail himself of the defense that the question propounded violates 18 U.S.C. 2515 because it was derived from illegal electronic surveillance. That holding was expressly predicated on the assumption "that the communications were not intercepted in accordance with specified procedures" and were, hence, illegal. Id. at 47. The Supreme Court reserved the issue of "whether [witnesses] may refuse to answer questions if the interceptions of their conversations were pursuant to court order" Id. at 61, n. 22. This Court addressed itself to that issue in

In Re Persico, supra, 491 F.2d 1156,[4/] where it held that a grand jury witness, having been granted "derivative use" immunity, may not refuse to answer where the necessary court order had been obtained, unless there was a prior judicial determination or a government concession that the surveillance was unlawful. Id. at 1162.

In deciding Persico, this Court looked to Mr. Justice White's concurrence in Gelbard, which supplied the decisive vote for that decision. Mr. Justice White intimited that when, during grand jury proceedings, the government does produce a court order, the traditional notion that the functioning of the grand jury system should not be impeded or interrupted could prevail over the witness's interest in exploring in depth the validity of the surveillance. See Gelbard, supra, 408 U.S. at 70. These considerations have recently been endorsed by the full Court in Calandra v. United States, 414 U.S. 338 (1974). See Persico, supra at 1160, n. 3.

The Persico decision also took note of Congressional concern over disruption of smooth and efficient operation of

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4/ The Supreme Court denied certiorari in Persico on October 21, 1974. Only one Justice would have granted certiorari. The brief for the United States urging denial of certiorari expressly relied upon the opinion of this Court.

the grand jury system. Although Congress required that illegal wiretap evidence be excluded from grand jury proceedings, it clearly directed that hearings to suppress evidence were not to be permitted during such proceedings. Persico, supra at 1162. Persico resolved this apparent inconsistency by requiring exclusion "only when it is clear that a suppression hearing is unnecessary", id. at 1161, e.g., because the illegality of the wiretap has already been shown or admitted.

This case is on all fours with Persico. Appellant was accorded "derivative use" immunity; notwithstanding, he refused to answer a question before the grand jury; and he was cited for civil contempt under 28 U.S.C.1826(a). In the face of three district court orders authorizing the electronic interception, he sought to defend the contempt action on the basis of alleged illegality in the interception and, hoping to discover a facsimile of substance for that defense, sought inspection of the court orders and supporting affidavits. Properly turned away in the district court, he brings this appeal based on a decision of another circuit, In Re Lachiatto, 497 F.2d 1175 (1 Cir., 1974), and the ruling of a district court in a case not involving testimony, which was in any event reversed by a unanimous panel of this Court, Vigorito v. United States, 499 F.2d 1351 (2 Cir., 1974), certiorari denied No. 74-232, December 9, 1974. We submit that Persico disposes of the issue.

B. An Immunized Witness Is Not Entitled To Inspect, For Purposes Of Challenging The Legality Of Electronic Surveillance, Court Orders Authorizing The Surveillance And Their Supporting Affidavits.

As appellant concedes, the issue here is "identical" to the issue resolved adversely to him in Persico (App. 81). Appellant seeks inspection of these documents "to determine prima-facia insufficiency" (App. Br. 8), in order to challenge their validity. Under Persico he has no right to make the challenge; a fortiori he has no right to make the inspection.

II. THE APPLICATION TO THE COURT FOR AN IMMUNIZING ORDER WAS ADEQUATE, AND THE IMMUNITY SECURED THEREUNDER WAS, CONSEQUENTLY, EFFECTIVE.

Immunity may be secured for a grand jury witness by a three-step process set forth in 18 U.S.C. 6003 and summarized by this Court in In Re Di Bella, 499 F.2d 1175, 1177 (2nd Cir., 1974), certiorari denied, No. 73-2064, November 25, 1974. Those steps are, first, application to the Attorney General, his Deputy, or designate; second, approval by one of those officials; and third, subsequent request to the court for an immunity order. The application to the district court in this case was made by a Special Attorney of the United States in the name of the United States Attorney but without his personal participation. We note this Court's view that, in the application to the court for an immunity order, "the wiser course in the future would be to directly involve the

United States Attorney", Di Bella, supra, 499 F.2d 1175, 1178. However, the application here was made prior to the Di Bella decision, under a procedure that had been followed for some time without any prior suggestion that it was less than completely proper. Under these circumstances, an application submitted formally by a Special Attorney in the name of the United States Attorney was sufficient for a grant of immunity.

The United States also submits that an analysis of the facts in this case viewed in light of the wiretap "signature cases", United States v. Giordano, 94 S.Ct. 1820 (1974) and United States v. Chavez, 94 S.Ct. 1849 (1974) demonstrates that absence of direct involvement by the United States Attorney in the immunity application to the court should not invalidate the grant of immunity. Giordano and Chavez teach that whether misidentification of the authorizing Department of Justice official in an application to the court for a wire interception order will invalidate that order depends upon whether the reviewing and approval functions Congress painstakingly established to regulate this activity have been satisfied.

Three major aspects of this case make it clear that the grant of immunity in issue comports with the reasoning and spirit of Giordano and Chavez. These aspects are, first, the nature of the interest involved; second, the character of the government activity for which court approval was sought; and, third, the Congressional attitude

as manifest in specific differences between the wiretap statute and the immunity statute.

The nature of Langella's interest in the immunity order is altogether different from the interest at stake in Giordano and Chavez, which was, briefly, the constitutional right to privacy. That right is a jealously guarded one, upon which the government may infringe only to the extent required by the most pressing reasons. Wiretapping may not be undertaken as a matter of course. It is privacy that prevails as a matter of course.

On the other hand, Langella has no such matter-of-course interest in withholding his testimony. Quite to the contrary, as the Supreme Court has emphatically reiterated of late, the grand jury "has the right to every man's evidence", United States v. Nixon, 94 S.Ct. 3090, 3108 (1974). The individual's privilege to withhold that evidence, not the public's right to demand it, is the rare exception.

Immunity and wiretapping differ as night and day. An individual loses something of legally recognized value when the government taps his phone; he loses nothing that the law protects, and he may gain a great deal, when the court immunizes his testimony. In the first instance, his privacy is undermined; in the second, his right not to incriminate himself is, far from undermined, guaranteed in a way that affords "considerably broader protection than does the Fifth

Amendment privilege", Kastigar v. United States, 406 U.S. 441, 453 (1972) [Emphasis added]. Procedural guidelines must be construed in light of what in substance is at stake: where, as in wire interceptions, the government seeks to infringe on one's right to privacy, the authorizing procedures are properly invested with inflexible precision; where, as in grants of immunity, it seeks to supplant one broad protection with another still broader, the authorizing procedures should be interpreted in a less demanding spirit.

A second and related aspect of this case that sets it apart from the "signature cases" is the character of the government's interaction with the parties. In Giordano and Chavez, authorizing signatures were sought for the ultimate purpose of prosecuting the litigants. Here, the Special Attorney applied to the court not for the purpose of prosecuting Langella, but of irretrievably emancipating him from even the possibility of prosecution arising from his testimony.

The different statutes governing immunity and wiretapping amply reflect the different considerations involved. The wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, is a model of deliberate checks, safeguards and remedies that mirror Congressional and popular misgivings about the use of wiretapping. See Giordano, supra. These provisions find no counterpart in 18 U.S.C. 6003, which briefly sets out

the procedures for requesting immunity. The significant difference between the wire interception and immunity statutes is illustrated by the suppression remedy set forth 18 U.S.C. 2518(10)(a), which is afforded to "any aggrieved person" on the basis of, inter alia, authorization not in conformity with the statute or facially insufficient. Conversely, 18 U.S.C. 6003, enacted two years later, provides no "remedy" for the apparent reason that, there being no "wrong" worked by an immunity granted other than on the direct and personal application of the United States Attorney, no "remedy" need be created. Moreover, unlike the wiretap statute, there is virtually nothing in the legislative history of section 6003 or its companion sections to indicate a Congressional intent to limit the authority to apply to the court and confine it to a central figure "responsive to the political process."[5/]

5/ The legislative history of the immunity statutes show that Congress was most concerned with the transition from "transactional" to "use" immunity. A secondary concern was to promote uniformity in the administration of federal immunity, and for that reason requests to the Attorney General and designated subordinates for authorization to apply to the court were required. See H.Rep. No. 1188, 91st Cong., 2d Sess. (1970).

Accordingly, for a valid wire interception it is essential that the Attorney General or designated Assistant Attorney General approve the application. Giordano, supra at 1326. On the other hand, misidentification of the authorizing official in the wire interception application to the court does not affect the validity of the interception order. Chavez, supra at 1854. A fortiori, once an immunity application has been approved by the Attorney General or designated Assistant Attorney General pursuant to 18 U.S.C. 6003(b), submission of the application to the court by a Special Attorney in the name of, but without the direct participation of, the United States Attorney should not affect the validity of the immunity order.[6/]

6/ We note the Special Attorney's authority, as described in 28 U.S.C. 515(c):

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

In United States v. Morton Salt Company, 216 F. Supp. 250, 255 (D.C. Minn. 1962), aff'd, 382 U.S. 44 1963), the court stated [when discussing the predecessor to Section 515 (Title 5, United States Code, Section 310)]:

> "It must be apparent that this section vests the authorized officers of the Department of Justice assigned to a District with the same authority as the United States Attorney for that District. Their powers are conterminous."

We submit, then, that the immunity order requested by the Special Attorney was effective, and, therefore, that appellant was properly ordered to testify.

III THE ORDER EXTENDING THE ORIGINAL TERM OF THE SPECIAL GRAND JURY FOR AN ADDITIONAL SIX-MONTH PERIOD FROM SEPTEMBER 19, 1974 WAS IN ALL RESPECTS VALID.

Pursuant to 18 U.S.C. 3331(a), a special grand jury was convened by Chief Judge Jacob Mishler, to be empaneled on September 19, 1972 for a term of 18 months "or until such time as its term may be extended pursuant to law." (App. 133). Its term was extended twice by the judge for six-month periods, once on March 12, 1974 (App. 134), the second time on August 26, 1974 (App. 136).

The enabling statute provides specifically that if, at the end of the original term "or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months" but not to exceed a total life of 36 months. 18 U.S.C. 3331(a).

The extension order challenged here expressly recites the court's determination that "the business of the grand jury has not been completed." (App. 136). The extension provided would authorize a total life of 30 months, well within the statutory limit. It is therefore, valid.

Appellant's third point comes before this Court altogether unencumbered by authority. At bottom, appellant urges that, because the government failed to announce to the

extending court that he had chosen to be jailed rather than meet his duty to assist the grand jury's investigation by testifying, the grand jury should now be disbanded. This, he suggests, would serve the "interests of justice and due process." We submit that these interests would be better served by appellant's full and frank testimony before the grand jury and his subsequent release.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief for Appellee, United States of America, were mailed this day to counsel for appellant, Gustave H. Newman, 522 Fifth Avenue, New York, New York 10036.

Dated: December 26, 1974

William G. Otis

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